

# DOL ERISA Enforcement

## Labor & Employment Law Update

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The U.S. Department of Labor, Employee Benefit Security Administration (EBSA) is responsible for the enforcement of the Employee Retirement Income Security Act of 1975 (ERISA). EBSA recently announced that, in 2017, by enforcing ERISA, it restored \$1.1 billion to employee benefit plans. Of this amount, about 60% was from civil investigations and 40% from informal complaint resolutions.

Of course, the flip side of \$1.1 billion going to employee benefit plans is \$1.1 billion paid by employers, fiduciaries and their insurers.

This announcement from EBSA appeared roughly contemporaneously with a number of surveys of defined contribution plan (e.g., 401(k) plan) fiduciaries, which found that an astonishing number, approximately 50%, do not know they are fiduciaries and that, consequently, their assets are potentially exposed under ERISA. Worse, many appear to believe that they can completely shed ERISA liability by hiring a third party.

Clearly, many plan sponsors need to revisit fundamentally their ERISA structures: who is a fiduciary?; who has what fiduciary duties?; what outside help – e.g., investment adviser or investment manager, is needed?; do the fiduciaries have adequate fiduciary liability insurance?; etc. Frequently, existing plan documents will be found inadequate. Perhaps, they were inadequate initially, but many have become outdated because of changing plans, regulatory revisions, personnel turnover, or other factors.

Other than the trustee and the plan administrator, which are always fiduciaries, the definition of an ERISA fiduciary is based on the actions and responsibilities of a person. Under ERISA, a person is a fiduciary to the plan to the extent the individual performs any of the following:

- Exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets.
- Renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so.
- Has any discretionary authority or discretionary responsibility in the administration of such plan.

The extent of fiduciary status can vary from person to person, depending on the specific plan duties each person performs. For example, an individual responsible for investment selection or monitoring will be a fiduciary for the assets under his control, but won't be a fiduciary when it comes to benefit claim decisions assuming this is outside his or her duties.

ERISA mandates that a plan fiduciary must discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

- for the exclusive purpose of providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan;
- with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
- by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
- in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with ERISA.

A fiduciary should be aware of others who serve as fiduciaries to the same plan because all fiduciaries have potential liability for the actions of their co-fiduciaries. For example, if a fiduciary knowingly participates in another fiduciary's breach of responsibility, conceals the breach or doesn't act to correct it, that fiduciary is also liable.

Certain transactions are prohibited under ERISA to prevent parties from exercising improper influence over the plan. Fiduciaries are prohibited from taking advantage of their position or acting in one's own self-interest rather than in the best interest of the plan.

A fiduciary that breaches any of the responsibilities, obligations or duties imposed under ERISA can be personally liable for reimbursing the plan for any losses. Even if a fiduciary delegates duties to others, the delegating fiduciary retains fiduciary responsibility for prudently monitoring their performance.